

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THERESA BALKONIS

v.

UNITED STATES OF AMERICA  
and DEPARTMENT OF HOUSING  
AND URBAN DEVELOPMENT

NO. 01-CV-5541

MEMORANDUM AND ORDER

McLaughlin, J.

August 14, 2002

The plaintiff, Theresa Balkonis, has sued the United States and the Department of Housing and Urban Development ("HUD") under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, for damages resulting from injuries she allegedly sustained in a trip-and-fall on the sidewalk in front of a HUD-owned property. The defendants move **to** dismiss the complaint for lack of subject-matter jurisdiction, arguing that HUD is not a proper party under the FTCA and that the United States is not liable because the property in question was under the management and control of an independent contractor. The Court will grant the motion.

I. Background

On November 1, 1999, the plaintiff tripped and fell on the sidewalk in front of 1526 South 2<sup>nd</sup> Street, Philadelphia,

Pennsylvania. The plaintiff alleges that the "broken and collapsed sidewalk" in front of this property caused her to fall and suffer injuries, and that her injuries resulted from the United States' failure to inspect and repair the sidewalk or to warn the plaintiff of its dangerousness.

At the time of the incident, HUD owned the property in question. HUD commonly contracts with privately-owned management companies to manage HUD-owned properties. Under its single-family housing program, HUD neither makes loans nor builds housing. Pursuant to the National Housing Act, HUD insures private lenders (banks, savings and loan associations, mortgage companies, and other lending institutions) against the risk of default on the mortgages they originate. See 12 U.S.C. §1709. Because the lender is insured against loss, the borrower benefits through lower mortgage interest rates or more favorable terms than can ordinarily be received under a conventional mortgage.

In the event the borrower defaults, the lender is required to foreclose and convey the property to HUD in order to claim the insurance proceeds. The properties are then placed under the supervision of an independent contractor to market the property for timely resale to a qualified purchaser. The proceeds from the sales are then returned to the insurance funds. In an average month, over 1,000 properties are assigned to HUD

within the jurisdiction of HUD's Philadelphia Homeownership Center, which includes over 8,000 properties in its inventory.

HUD entered into a contract with First Preston to furnish certain services for single-family properties owned by or in the custody of HUD including, in 1999, 1526 South 2<sup>nd</sup> Street. Appendix to Defendants' Motion to Dismiss, Ex. 2. Under the terms of the contract, First Preston had the following obligations with respect to maintenance of the property:

- to provide all facilities, materials, supplies, equipment, labor and services required to successfully manage the property (Id. at C-5);

- to routinely inspect and take all actions necessary to preserve, protect and maintain each property in a presentable condition at all times. "This... includes [c]orrection of ANY condition that presents a health or safety hazard to the public or to the property within 24 hours of discovery. This would include repair of broken steps or floorboards, removal of hazardous materials such as gasoline cans or oil-soaked rags, or removal of dead animals or feces" (Id. at C-7);

- to recruit, hire, train, and supervise qualified employees (Id. at C-10); and

- to maintain fully staffed, equipped and supplied

offices to manage the assigned properties from 8:00 to 4:30, Monday through Friday, including a mandate that the contractor "establish a toll-free 24-hour emergency number to handle emergency problems" (Id. at C-12).

## II. Discussion

The defendants have moved, pursuant to Federal Rule of Civil Procedure 12(b) (1), to dismiss for lack of subject-matter jurisdiction. In ruling on such a motion, the Court may consider exhibits outside the pleadings. ~~Mortensen v. First Federal Savings and Loan Ass'n~~, 549 F.2d 884, 891 (3d Cir. 1977). "[T]he trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Id. The plaintiff has the burden of proof that jurisdiction exists. Id.

The United States, as sovereign, is immune from suit unless it consents to be sued. ~~U.S. v. Sherwood~~, 312 U.S. 584, 586 (1941). This sovereign immunity is waived only to the extent that Congress, in an unequivocal statement, consents to the waiver. U.S. v. Mitchell, 445 U.S. 535, 538 (1980). Congress has consented to such a waiver for tort claims against the U.S. and its agencies under the FTCA.

The FTCA permits actions for damages against the United States for injuries caused by the tortious conduct of United

States agents or employees acting within the scope of their employment to the extent that a private party would be liable under state law. See 28 U.S.C. § 1346(b) (1) (2002). The FTCA, therefore, provides for a limited waiver of the United States' sovereign immunity, but this waiver restricts liability to acts or omissions of agents or employees of the United States.<sup>1</sup> See id. § 2671. By its express terms, the FTCA does not provide for liability of the United States for the acts or omissions of independent contractors. See id.

The question of whether someone is an independent contractor or an agent/employee **of** the United States is a question of federal law. "The critical factor used to distinguish a federal agency employee from an independent contractor is whether the government has the power 'to control the detailed physical performance of the contractor.'" Norman v. U.S., 1996 WL 377136, at \*2 (E.D. Pa. July 3, 1996) (quoting U.S. v. Orleans, 425 U.S. 807, 814 (1976)). "The question here is... whether [the contractor's] day-to-day operations are supervised by the Federal Government." Orleans, 425 U.S. at 815.

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<sup>1</sup> The FTCA explicitly states that the United States is the only proper defendant in an FTCA case, and that the authority of a federal agency to sue in its own name does not authorize suits against the agency for personal injuries caused by the alleged negligence **of** a federal employee. 28 U.S.C. § 1346(b) (2002). **I**, therefore, will dismiss the claim against HUD.

The Third Circuit affirmed the dismissal of a suit against the United States in circumstances similar to those here in Norman v. United States. 111 F.3d 356 (3d Cir. 1997). The plaintiff in Norman alleged that the United States was liable for injuries he sustained when he slipped and fell in the Ceremonial Courtroom of the U.S. Courthouse. Id. at 357. The United States moved to dismiss on the ground that an independent contractor was responsible for providing custodial and janitorial services in the buildings, including the cleaning and maintenance of the entrances, lobbies and corridor. Id. The district court granted the motion and the Court of Appeals affirmed. Id. at 358; see also Williams v. United States, 50 F.3d 299, 302 (4<sup>th</sup> Cir. 1995) (finding the United States not liable for slip-and-fall in lobby of building leased by the United States when a third party was responsible for building maintenance).

The principles enunciated in these cases require dismissal of the present case. Preston manages the property in question - a broader function than those of the independent contractors in Norman and Williams. It supervises the day-to-day management and marketing of the properties under the contract. It was responsible for preventing and correcting any dangerous conditions on the property. It is an independent contractor.

An appropriate order follows.

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O R D E R

AND NOW, this 14<sup>th</sup> day of August, 2002, upon consideration of the Motion of Defendants, the United States and the Department of Housing and Urban Development, To Dismiss for Lack of Subject-Matter Jurisdiction (Docket #4), and the plaintiff's opposition thereto, it is hereby Ordered and Decreed that said motion is granted for the reasons stated in a memorandum of today's date.

BY THE COURT:

  
MARY A. MCLAUGHLIN, J.

*filed 8/14/02*

*John Gonsky III, Esq.  
OK. J. Dombrowski, Esq.  
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